STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	:	
	:	
Filing to implement tariff provisions related to	:	**01-0614**
Section 13-801 of the Public Utilities Act	:	

BRIEF ON EXCEPTION OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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BRIEF ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) respectfully submits this Brief on Exceptions to the Administrative Law Judge's Proposed Order issued on March 8, 2002 ("Proposed Order").

INTRODUCTION

Staff commends the Administrative Law Judge ("ALJ") for the well-reasoned and in-depth analysis contained in the Proposed Order ("Proposed Order" or "HEPO"), and in general supports the conclusions contained therein as pro-competitive, good public policy and consistent with the record developed in this case. Notwithstanding the above, Staff takes exception to the following findings and conclusions reached by the ALJ.

EXCEPTIONS

Exception No. 1: HEPO Issue L (Disclaimer Language)

The Proposed Order provides, in relevant part, that:

> The Commission has reviewed the evidence and the arguments of the parties and finds Ameritech's proposed general terms and conditions

> discussed in this portion of the order, to be acceptable. We are unconvinced by the arguments of the parties who suggest that the appearance of language in a tariff contemplating the withdrawal of a service based upon a decision of a court or legislature somehow inoculates the Company from the requirement that non-competitive services may be withdrawn only upon approval of the Commission. We note that this language appears in many of Ameritech's tariffs, yet no party has indicated a single in instance where the feared behavior has occurred. Conversely, we are concerned about Ameritech's proposed language relating to the congruity between state and federal law. As long as Ameritech operates in Illinois, it will, in our opinion be required to comport itself with the laws and regulations of the State. In this order we have concluded that the legislature has enacted legislation the is [sic] differs from federal law and that we are bound to enforce and interpret that legislation. To that end, Ameritech must remove the phrase "to the extent not inconsistent with" from its reservation of rights language.
>
> Proposed Order at 123

Staff takes exception to portions of this provision. Contrary to Ameritech's assertions that Staff did not object to the two changes to the General Terms and Conditions, Staff has always asserted, and now reiterates, that certain of the changes proposed by Ameritech are excessively broad and vague. The Proposed Order's Analysis and Conclusion is based on two incorrect premises.

First, the Proposed Order finds that Staff's position is premised upon the notion that the objecting language confers the power to withdraw service on Ameritech Illinois. *See* Proposed Order at 123 ("We are unconvinced by the arguments of the parties who suggest that the appearance of language in a tariff contemplating the withdrawal of a service based upon a decision of a court or legislature somehow inoculates the Company from the requirement that non-competitive services may be withdrawn only upon approval of the Commission.") This however, mischaracterizes the Staff's position, which is based upon the premise that the nature of the language, which gives Ameritech Illinois virtually unlimited authority changing a tariff, is, by its very existence, likely to

affect parties' future conduct. The chilling effects of ambiguous tariff language on the parties and development of competitive market cannot be doubted, even assuming that Ameritech does not use the tariff language in a manner that maximizes its advantage. Very simply put, if the language affords excessive power to one of the parties to unilaterally interpret the tariff, or if it engenders confusion, the language should be either removed or amended to eliminate ambiguity.

Second, the Proposed Order suggests that no party in this proceeding cites any instance where Ameritech has used similar broad and vague language to unilaterally withdraw services. Proposed Order at 123. The Proposed Order seems to presume that, until and unless Staff or another party offers historical evidence of misuse, an ambiguous, a broad and vague tariff provision is appropriate. The Proposed Order 's conclusion on this issue is premised upon the supposition that, until Ameritech has unilaterally withdrawn a tariffed service, and Staff has documented such an instance, it is acceptable that the company incorporates a broad and vague disclaimer. As such, this reasoning imposes no limit on the types of reservation of rights language that are acceptable. This is not appropriate. It is Staff's position that rather than waiting for Ameritech Illinois to unilaterally withdraw a tariffed service, which will very probably result in a complaint and investigation by this Commission, the most logical approach is to *prevent* such an occurrence. In other words, the Staff seeks to remove a provision that, by its very ambiguity and over-breadth, has a great deal of capacity to cause mischief.

In the instant case, no party has argued that Staff's recommendation is burdensome, irrelevant and inappropriate. In fact, to the contrary, Ameritech, and the

Proposed Order have simply concluded that without historical precedent, the proposed exceptions should be allowed as *fait accompli*. This is not appropriate, for the reasons set forth above.

Furthermore, Ameritech Illinois raised two issues in its response to Staff that appear to have affected the Proposed Order's analysis and conclusion. First, the company claimed Staff's objection "was raised for the first time" in the post-hearing brief. In essence, Ameritech Illinois was indirectly suggesting that it was surprised by the Staff position. *See* Proposed Order at 122. This assertion ignores the fact that this is an exclusively legal issue, which need not be, and arguably should not be, addressed in testimony. Besides, Ameritech not only had a full opportunity to respond to Staff's position, but also was the only party with the right to present surrebuttal in this proceeding, and it therefore had the opportunity to address Staff's position. It is therefore disingenuous of Ameritech Illinois to contend that Staff's argument came as a surprise.

Secondly, Ameritech Illinois argued that the objecting reservation of rights was just another form of "change of law" language. While it is unquestionably true that this is, as Ameritech contends, a change of law provision, the issue is not whether such provisions are common in tariffs as a generic matter, but rather whether this particular provision is acceptable. Since, as noted above, it is not, Ameritech's argument is irrelevant.

Exception No. 1: Proposed Replacement Provisions

For the reasons stated above, the Staff recommends that the Proposed Order be amended as follows:

> The Commission has reviewed the evidence and the arguments of the parties and finds Ameritech's proposed general terms and conditions discussed in this portion of the order, to be unacceptable. We are ~~un~~convinced by the arguments of the parties who suggest that the appearance of language in a tariff contemplating the withdrawal of a service based upon a decision of a court or legislature ~~somehow~~ inoculates the Company from the requirement that non-competitive services may be withdrawn only upon approval of the Commission. ~~We note that this language appears in many of Ameritech's tariffs, yet no party has indicated a single in instance where the feared behavior has occurred.~~ We further note that, even if Ameritech makes the most scrupulous use of this provision, and withdraws services only when it is utterly within its rights to do so, the change of law provision in question introduces an element of uncertainty into the tariff that we find unacceptable. ~~Conversely~~ Likewise, we are concerned about Ameritech's proposed language relating to the congruity between state and federal law. As long as Ameritech operates in Illinois, it will, in our opinion be required to comport itself with the laws and regulations of the State. In this order we have concluded that the legislature has enacted legislation ~~the is~~ that differs from federal law and that we are bound to enforce and interpret that legislation. To that end, Ameritech must remove the phrase "to the extent not inconsistent with" from its reservation of rights language.

Exception No. 2: HEPO Issue N (BFR)

Staff excepts to the Proposed Order's conclusion that Ameritech's bonafide request ("BFR") process, with only the two modifications described in the Proposed Order, should be used. In Staff's view, at a minimum, two additional modifications are required to make the BFR process acceptable for these purposes.

Staff continues to believe that the BFR process materially impairs, if not precludes, carriers from providing their desired services using unbundled network elements obtained through BFR requests. As Staff explained, it is neither troubling nor unexpected that there is separation between Ameritech's retail and wholesale operations. Indeed, that is a prerequisite to the crucial goal of achieving parity of treatment between Ameritech's retail operations and those of the CLECs. Any preferential treatment given Ameritech's retail operations impairs competitors' ability to

compete with Ameritech using unbundled network elements. The BFR process, as currently constituted, gives Ameritech's retail operations such impermissible preferential treatment. Staff Reply Br. at 51. A CLEC that requests a network element through the BFR process may not be able to provide its desired services for four months or longer. In stark contrast, Ameritech may offer the service at the time the request is initiated.[1] Customers seeking service provided with the unbundled network element will therefore be able to obtain service immediately from Ameritech, but may be forced to wait for four months or longer if they elect service from a CLEC. The BFR process provides Ameritech an inappropriate competitive advantage.

The root of the problem is Ameritech's reactive approach to wholesale provisioning. As currently configured, Ameritech's wholesale systems provide discriminatory service to Ameritech's competitors relative to the service they provide Ameritech's own retail operations. In order to meet the nondiscriminatory provisions of Section 13-801(d) carriers should have access to Ameritech's wholesale systems that is equal to the access that Ameritech's retail operations have. However, Ameritech has configured its systems so that even when its systems are capable of providing network elements to its own retail units these systems are incapable of providing these network elements to CLECs When CLECs request network elements that Ameritech does not currently offer to CLECs, Ameritech must revise its wholesale systems, a process that apparently requires four months or longer. As a consequence, Ameritech's BFR

[1] Ameritech has stated "[a]s a result of the very separation the CLEC industry has demanded, there are many complex ordering, billing and provisioning systems that need to be evaluated and updated to support any new wholesale offering regardless of whether the offering is currently available on the retail side or not." Ameritech Br. at 123; Staff Reply Br. at 51.

process essentially negates carriers' ability to add unbundled network elements to the list of those that Ameritech currently provides.

The BFR-OC process, the BFR process that Ameritech has proposed for requesting carriers seeking ordinary combinations of unbundled network elements, reduces the time Ameritech allots for processing its own BFR requests by 25%. (Ameritech Ex. 3.1, at 28). Therefore, in seeking ordinary combinations carriers may expect processing of such requests to take in excess of three months. Again, this delay occurs despite the fact that Ameritech ordinarily combines the unbundled network elements for provision of its own services at the time the request is initiated. Ameritech's proposed decrease in processing time may reduce – but does not eliminate - Ameritech's inappropriate and unwarranted competitive advantage over carriers seeking to provide services using ordinary combinations obtained through the BFR-OC process.

Section 13-801(d)(3) requires Ameritech to do the work to combine unbundled network elements that Ameritech ordinarily combines for itself. Therefore, Ameritech's wholesale provisioning process must be revised in order to comply with its expanded obligations under Section 13-801(d)(3). This creates an opportunity for Ameritech to change its systems to make them more open (i.e., able to readily accept ordinary combinations not specifically included in its tariff). The Proposed Order correctly rejects Ameritech's position that the list of combinations contained in its tariff reflects all ordinary combinations it is required to make available to CLECs. Proposed Order, at 56, 150. At the same time, however, the Proposed Order would allow Ameritech to

restrict, in practice, the set of ordinary combinations to those meeting its narrow interpretation. This is precisely what the BFR-OC process allows Ameritech to do.

Staff concurs with the finding in the Proposed Order that the record fails to reflect with specificity additional ordinary combinations that CLEC's might request that are not already identified in Ameritech's proposed tariff. Proposed Order, at 149. However, this lack of specificity is to be expected, since Section 13-801(d)(3) expands Ameritech's obligations, and CLECs have no experience with the new opportunities this affords. The specificity absent in this proceeding will soon appear as carriers begin to order and provide service using these new offerings. Through actual experience carriers will learn what ordinary combinations Ameritech provides under tariff and what ordinary combinations Ameritech subjects to the BFR-OC process. Staff expects this learning process to be similar to that experienced by carriers seeking conversions of services to unbundled network element combinations–a learning process that is well documented throughout this proceeding in Sections E, F, G, and H of the Proposed Order, for example. Staff agrees that "the process for requesting new combinations is something that may be of great necessity in the future." (Proposed Order, at 149). However, the future will be here shortly.

In light of these considerations, the Commission could reject the BFR-OC process and order that CLEC requests for additional ordinary combinations be provisioned consistent with Section 13-801(d)(5) of the PUA or existing Commission orders. The Commission could also require Ameritech to configure its wholesale systems so that they are able to process requests for any ordinary combination in a manner that does not discriminate between requesting carriers and Ameritech's own

retail operations. However, as explained in the Proposed Order, because parties have not identified specific additional combinations that they believe should be included in the tariff, there remains a question of the immediate necessity of the process of requesting new combinations at this time. Therefore, Staff narrows its exceptions to the following two items, which, in Staff's opinion, are essential if the Commission adopts the BFR-OC process. If the Commission accepts the BFR-OC process Staff recommends that when a step has been completed Ameritech should also provide the Commission with the formal responses sent to carriers upon completion of the step. To the extent these requests are made, Staff concurs that "[b]y remaining involved in the process and compiling a record of its facility, the Commission will be in a better position to determine whether [the BFR process] should be allowed to continue in the event that Staff or another party suggests that it should not." Staff concurs with this assessment, but believes the Commission requires information such as projected prices, provisioning intervals, and other terms and conditions associated with provisioning of the request to appropriately monitor the process. Staff also cautions that if this BFR-OC process proves excessively unwieldy, CLECs may not use it, and the Commission's monitoring efforts may not fully alert the Commission to its deficiencies. In addition, if the Commission accepts the BFR-OC process, Staff recommends that the Commission modify the Proposed Order to require Ameritech when using the BFR-OC process to notify the requesting carrier within 2, rather than 10, business days of the initial request whether Ameritech will accept the request or whether Ameritech will reject the request on the grounds that the requested UNEs are not "ordinarily combined" by Ameritech Illinois.

Accordingly, Staff recommends that the "Commission analysis and conclusion" section at page 150 of the Propose Order be amended as follows:

Exception No. 2: Proposed Replacement Provisions

5. Commission analysis and conclusion

The Commission has reviewed the evidence and arguments of the parties and concludes that, for now, Ameritech's proposed BFR-OC process, with ~~two modifications~~ the modifications explained below, should be utilized to process requests for new combinations. This matter, unlike most of the issues addressed in this docket is not subject to ready resolution through reference to the new statute, although some provisions of the statute bear on the outcome. In reaching our conclusion, we note that the legislature has set out, with specificity the minimum "ordinarily combined" combinations that Ameritech must make available to requesting carriers and that Ameritech has dutifully included the minimums in its tariffs. Further, none of the parties have indicated, with any specificity, any additional combinations that they believe should be included at this time. ~~From that we~~ This might reflect carriers' lack of operational experience with providing service using UNE combinations. Alternatively, we might infer that the process of requesting new combinations is something that may be of great necessity in the future, but is less necessary at this time. To that end, we decline to adopt the RAC process at this time due to our perception that it is, as Ameritech has indicated, a solution in search of a problem. That is not to say that we do not perceive shortcomings in Ameritech's proposal, the greatest of which is the apparently open ended time frame to actually provision the combination requested through the BRF process. Nonetheless, until such time as the parties have had an opportunity to engage in the process in the context of ordering new combinations, the Commission is willing to allow its use. In the event that the process is as unwieldy as the Joint CLECs and Staff believe it will be, we are willing to revisit the subject, with an eye to incorporation the concepts proposed by the CLECs in the RAC proposal.

First, we adopt Staff's proposed requirement that the Commission and the requesting telecommunications carrier be notified within two days of the referral of any request to the BFR process and to be notified within two days of the completion of each step in the process. In such notifications, Ameritech should supply to the Commission the rates, terms, and conditions regarding the request that it supplies to the requesting carrier. In addition, both the Commission and the requesting carrier should be provided with a complete explanation of the grounds for any denial of any request within two days of the decision being reached. The notice should contain, at a minimum, the statutory grounds for denial, the factors that went into the decision that grounds for denial existed and the person or persons who participated in reaching the decision to deny the request, including an indication of who the ultimate decision maker was. By remaining involved in the process and compiling a record of its facility, the Commission will be in a better position to determine whether it should be allowed to continue in the event that Staff or another party suggests that it should not.

Second we adopt Staff's proposed requirement that Ameritech notify carriers within two days of submission of a BFR request whether the request will or will not be accepted. While Ameritech arguably may require a 90 day interval to perform the work to complete the BFR-OC process, there is no reason that Ameritech needs more than two days to determine whether a requested combination is a combination that Ameritech ordinarily combines.

We also adopt the proposal of Staff and the Joint CLECs, that a requesting carrier may trigger the BFR-OC process by simply requesting, on a UNE basis, retail services provided by Ameritech. We agree with Staff that the requesting carriers have little or no opportunity to become aware of what UNEs Ameritech is ordinarily combining for itself in the absence of such a process. In addition, we find Ameritech's objections to this proposal unfounded. If the request is denied because the service utilizes elements that not required to be unbundled or are proprietary to an end user, the notice of denial will indicate this fact and will be communicated to the Commission and the requesting carrier. If the requesting carrier is dissatisfied with the answer, section 13-801(d)(3) establishes the Commission as the decision maker in such disputes.

Exception No. 3: HEPO Issue O (schedule of rates)

While Staff's proposed incorporation of a network element requests into the statutorily required schedule of rates was rejected in the Proposed Order, Staff does not take exception to this determination. Proposed Order at 155. As noted in the Proposed Order, "Staff bases its proposal upon its belief that Ameritech has not made reasonable efforts to identify combinations of elements that it ordinarily does the work to combine." Proposed Order at 151. The Proposed Order permits requesting carriers to "trigger the BFR-OC process by simply requesting, on a UNE basis, retail services provided by Ameritech." Therefore, Staff's concern has been addressed, albeit through the BFR-OC process rather than through the rate request provisions in the tariff.

Exception No. 4: HEPO Issue P (The Proposed Order Improperly Accepts Ameritech's Provisioning Intervals)

The Proposed Order finds, with respect to the provisioning intervals, as follows:

> The Commission has reviewed the evidence and arguments of the parties and concludes that Ameritech's proposed provisioning intervals are

> acceptable. In terms of the proposals seeking the removal of the "tolling" effect of the Turn Up Test, the Commission agrees with Ameritech that we have previously recognized that the Turn Up Test must be performed prior to turning an HFPL loop over to a requesting carrier and that the test can not be performed in 24 hours. Further, we have also recognized that lines requiring conditioning take longer to provision than lines that do not. Nothing in the newly enacted legislation suggests that this was in error and we conclude that the 10 day period for providing loops requiring conditioning should apply to both loops ordered by CLECs and loops provided with only HFPL. More troubling is Ameritech's limitation on provisioning intervals relating to the number of loops ordered. While it may be true that Ameritech's business rules contemplate the 3/7/10 day provisioning intervals approved in the merger order, Ameritech's tariff's under consideration here speak only to the lack of any timeline for orders in excess of 20 loops. Such an open ended tariff term grants too much discretion to Ameritech. To that end Ameritech is ordered to incorporate the same 3/7/10 day provisioning intervals as are contained in its Business Rules into its tariffs, to assure that all orders for loops not requiring conditioning will be filled in a maximum of 10 days, regardless of the number of loops ordered.
>
> Proposed Order at 165.

Staff takes exception to a portion of the Commission Analysis and Conclusion in this section of the HEPO. This finding is defective for several reasons. First, the Proposed Order is not complete because it does not include specific requirements set out in the language of 13-801(d)(5). Second, the Proposed Order misstates prior Commission rulings. Third, the Proposed Order's deviation from the statutory requirements creates an unfair advantage for Ameritech. Finally, the Proposed Order does not clearly specify which provisioning intervals apply to the network elements.

A. The Proposed Order Fails To Take Into Account That Section 13-801(d)(5) Provides Further Guidance On The Quality Of Provisioning Some Specific UNEs

The Proposed Order is not complete because it fails to include specific requirements set out in Section 13-801(d)(5). Specifically, the Proposed Order does not include language which: (1) addresses the provisions establishing a shorter provisioning

interval; (2) provides the statutory exclusions excusing performance under the statute and this tariff; and (3) excludes the "per end user location" requirement.

As indicated in Staff's testimony and initial brief, Section 13-801(d)(5) clearly provides specific language that should be included in Ameritech's tariff. *See* Staff IB at 79-80, Attachment 1 at 1-3. Regarding the Commission's authority to establish a shorter provisioning interval for a network element than the intervals offered for retail services, Section 13-801(d)(5) states:

> The Commission may establish a maximum time period for a particular network element that is shorter than for a comparable retail telecommunications service offered by the incumbent local exchange carrier if a requesting telecommunications carrier establishes that it shall perform other functions or activities after receipt of the particular network element to provide telecommunications services to end users. The burden of proof for establishing a maximum time period for a particular network element that is shorter than for a comparable retail telecommunications service offered by the incumbent local exchange carrier shall be on the requesting telecommunications carrier.
> 220 ILCS 5/13-801 (d)(5).

Staff recommends that the above language should be included in the HEPO for a number of reasons. First, inclusion of this language would reinforce the Commission's specific authority granted by the legislature under certain identified circumstances to establish for a particular network element a shorter provisioning interval than the interval for a comparable retail telecommunications service. Second, inclusion in the tariff of the specific requirements clarifies by what means a party purchasing from the tariff could receive a shorter provisioning interval so established by the Commission. Staff IB at 80. Finally, in the spirit of fostering competition as well as efficiency, parties purchasing through the tariff would be made aware that a more rigorous provisioning interval may be available to them if they establish the required case for the shorter interval. Id.

Additionally, the HEPO should include the exclusionary language found in the last paragraph of Section13-801(d)(5) which states as follows:

> In measuring the incumbent local carrier's actual performance, the Commission shall ensure that occurrences beyond the control of the incumbent local exchange carrier that adversely affect the incumbent local exchange carrier's performance are excluded when determining actual performance levels. Such occurrences shall be determined by the Commission, but at a minimum must include work stoppage or other labor actions and acts of war. Exclusions shall also be made for performance that is governed by agreements approved by the Commission and containing timeframes for the same or similar measures or for when a requesting telecommunications carrier requests a longer time interval.
> 220 ILCS 5/13-801 (d)(5).

Staff believes this language must be included in the HEPO to clarify that there are instances whereby this Commission must consider, in measuring the incumbent local carrier's actual performance, certain statutorily identified exclusions that may modify the performance metrics. Staff IB. at 80-81. Possible exclusions the Commission must contemplate include labor actions and acts of war. Id. The Commission is also directed to consider, "occurrences beyond the control of the incumbent local exchange carrier." 220 ILCS 5/13-801(d)(5). Staff recognizes that there are circumstances beyond the control of the Company. Consequently, the tariff should reflect such instances and allow for such exclusions when the Commission monitors the incumbent's actual performance levels. Furthermore, parties purchasing through the tariff should be aware that this type of exclusion may be reflected in the incumbent's performance data.

Finally, the HEPO should specify that neither the tariff nor Section 13-801(d)(5) contains language that restricts the provisioning of the High Frequency Portion of the Loop ("HFPL") on orders for 1-20 loops per end user location. *See* Staff IB at 75-77. Ameritech places several restrictions on the application of HFPL provisioning interval

that were not included in the Act. *See* Ameritech Tariff C.C. No. 20, Part 19, Section 2, 4th Revised Sheet No.16. Specifically, the Ameritech tariff states:

> The provisioning and installation interval for HFPL, where no conditioning is requested (including outside plant rearrangements that involve moving a working service to an alternate pair as the only possible solution to provide a HFPL), on orders for 1-20 loops per order or ***per end user location***, regardless of length will be 24 hours, or the provisioning and installation interval applicable to the Company's advanced service affiliate's HFPL, whichever is less. (*emphasis added)*
> Id.

Although the HEPO correctly concludes that Ameritech should complete its provisioning within the specified intervals regardless of the number of loops ordered, the Proposed Order fails to recognize the inappropriate limitation on provisioning intervals relating to the number end user locations:

> *More troubling is Ameritech's limitation on provisioning intervals relating to the number of loops ordered*. While it may be true that Ameritech's business rules contemplate the 3/7/10 day provisioning intervals approved in the merger order, Ameritech's tariff's under consideration here speak only to the lack of any timeline for orders in excess of 20 loops. Such an open ended tariff term grants too much discretion to Ameritech. To that end Ameritech is ordered to incorporate the same 3/7/10 day provisioning intervals as are contained in its Business Rules into its tariffs, to assure that all orders for loops not requiring conditioning will be filled in a maximum of 10 days, *regardless of the number of loops ordered.(emphasis added)*
> Proposed Order at 165

The HEPO should also correct this apparent oversight and include language that will not allow Ameritech to place limitations on provisioning intervals by end user location. Staff suggests that the HEPO order Ameritech to delete the phrase "or per end user location" currently remaining in the above quoted portion of Ameritech's tariff.

B. The Proposed Order Does Not Correctly Reflect Prior Commission Rulings

1. The 3/7/10 Day Provisioning Intervals Were Not Approved In The Merger Order

The HEPO incorrectly states that "[w]hile it may be true that Ameritech's business rules contemplate the 3/7/10 day provisioning intervals *approved in the merger order*, Ameritech's tariff's under consideration here speak only to the lack of any timeline for orders in excess of 20 loops." (emphasis added) Proposed Order at 165. This reference to the Commission approval of the 3/7/10 day provisioning intervals in the merger order is incorrect. As Staff has pointed out on previous occasions, although the Commission has the authority in this proceeding to order the 3/7/10 day provisioning intervals, there has not been a prior order or rule from this Commission approving Ameritech's 3/7/10 provisioning intervals. *See* Staff IB at 81-83.

The Commission's Order approving the SBC/Ameritech merger in Docket 98-0555 ("Merger Order"), specifically in Condition 30, directed Ameritech to implement performance measures and standards. As a result of the Merger Order, Ameritech and Illinois CLECs participated in further collaborative proceedings to discuss those measures. Ameritech implemented 122 performance measures required by Condition 30 in August of 2000. Ameritech IB at 104-105. The performance measures agreed to by Ameritech and the CLECs included provisioning intervals of 3 days for one to 10 UNE loops, 7 days for 11 to 20 loops and 10 days for more than 20 loops. Id. Ameritech provisioning Business Rules contain the 3/7/10 day provisioning intervals. Ameritech has also stated that its tariff will reflect the 3/7/10 day intervals which have been established pursuant to the Commission Order in Docket 98-0555. Id. at 106. Still, it would be more accurate to state that the Commission approved, in the merger order, the *collaborative process* by which the parties agreed to these intervals. The Commission, however, never approved these

intervals that were agreed to by collaborative participants. Therefore, even though the Commission directed Ameritech to implement performance measures in the Merger Order, the specific 3/7/10 day intervals were never approved in that order, or any other order, by this Commission. Furthermore, contrary to Ameritech's assertion, although the 3/7/10 day intervals are contained in Ameritech's Business Rules and its tariff, the specific intervals are not Commission *approved* rules.

As Staff explained in its initial brief, a tariff is not a rule that has been approved pursuant to the Illinois Administrative Procedure Act or subject to evidentiary hearing. Staff IB at 82-83. Nor is a tariff an order of the Commission. Id. Upon the filing of a tariff, the Commission determines whether to suspend the tariff, pending a hearing, or to let it go into effect. Commonwealth Edison Co. v. Illinois Commerce Comm'n, 180 Ill. App. 3d 899, 904 536 N.E. 2d 724, 728 (1988). The latter is known as passing a tariff to file. A. Finkl & Sons v. ICC, 325 Ill.App.3d 142; 756 N.E. 2d 933 1 Dist. (2001). Under section 9-201 of the Act, (220 ILCS 5/9-201) the Commission can pass a tariff to file without making formal findings or entering an order. *See* Antioch Milling Co. v. Public Service Co. of Northern Illinois, 4 Ill. 2d 200,206, 123 N.E. 2d 302,306 (1954). Thus, in "pass-to-file" tariff cases "the ICC is not required to contain sufficient findings, analysis, or substantial evidence." A.Finkl, 325 Ill. App.3d 142, 756 N.E.2d 933.

When Ameritech filed its tariff (Ameritech Tariff C.C. No. 20, Part 19, Section 1, Original Sheet Nos. 4.2 and 4.3), the Commission did not suspend it pending a hearing, rather, the Commission let it go into effect. Thus, it is a "pass-to-file" tariff and not an order of the Commission. Consequently, the provisioning intervals set forth in Section 13-801(d)(5) are currently the effective intervals. As a result, Staff believes the 5-day interval

to be the standard *unless and until* the Commission establishes by *rule or order* a different specific time interval. 220 ILCS 5/13-801(d)(5) (emphasis added).

C. The Proposed Order's Deviation From The Statutory Requirements May Create An Unanticipated Competitive Advantage In Favor of Ameritech.

The HEPO adopts the 3/7/10 day provisioning intervals. These intervals are not consistent with the five day interval set forth in Section 13-801(d)(5), and could create an anti-competitive marketplace for the CLECs.

Staff continues to support the 5 day provisioning interval as set forth in Section 13-801(d)(5) for the reasons set forth in its Initial Brief. *See* Staff IB at 81-83. Additionally, Staff notes that the Proposed Order's adoption of a 3/7/10 day interval may create an unexpected result under Section 13-712(d)(1) of the recently enacted PA 92-0022. Section 13-712(d) provides that consumer credit rules are to be established by the Commission and shall impose, at a minimum, certain obligations on the part of telecommunications carriers. In particular, the rules shall require each telecommunications carrier to:

> (1) Install basic local exchange service ***within 5 business days*** after receipt of an order from the customer unless the customer requests an installation date that is beyond 5 business days after placing the order for basic service and to inform the customer of its duty to install service within this timeframe….
>
> ILCS 5/13-712(d)(1) (Emphasis added)
>
> Section 13-712(d)(1) also provides that:
>
> …A telecommunications carrier offering basic local exchange service utilizing the network or network elements of another carrier shall install new lines for basic local exchange service within ***3 business days after provisioning of the line or lines by the carrier whose network or network elements are being utilized is complete***….

ILCS 5/13-712(d)(1) (Emphasis added)

Thus, under certain circumstances, application of the Proposed Order's conclusion regarding provisioning intervals could create the result that a consumer who orders basic local exchange service from an ILEC would obtain such installation within 5 business days. Assuming that Ameritech meets the standards set forth in Section 13-801 and 13-712(d)(1), if a consumer orders that same service from a CLEC, not only would there be an additional three days, but if the interval is part of a larger order, under the Proposed Order, Ameritech would then have 10 days to provision the service to the CLEC. As a result, the CLEC's provisioning of the order to that same customer would require an additional 5 days (10 – 5 = 5) in comparison to Ameritech's provisioning to the customer. If the ordering of basic local exchange service also requires loop conditioning, then an additional 10 days may be added. As a result, a consumer ordering from a CLEC may have to wait a total of 18 additional days (3+5+10=18) in comparison to an order placed with Ameritech.

Staff posits that the legislature did not intend for the differential in provisioning intervals between Ameritech and CLECs to be as great as 18 days. If Staff's 5 day provisioning interval was adopted (rather than the 3/7/10 day interval set forth in the Proposed Order) then the differential would be the 3 days set forth in Section 13-712(d)(1) for loops that do not need conditioning. Furthermore, if the Proposed Order clarifies that loop conditioning applies only when advanced services are ordered and not to an order of basic local exchange service or, as discussed below that loop conditioning and provisioning intervals run concurrently, then the potential 13 (3+10) day differential for orders that need loop conditioning would not become a reality. As a result of the potential

disadvantage a CLEC may well face in light of Ameritech's greater ability to provide faster installation, Staff asks the Commission to reconsider its decisions on this issue.

For the convenience of the parties, the full text of Section 13-712(d)(1) reads as follows:

> (d) The rules shall, at a minimum, require each telecommunications carrier to do all of the following:
>
> (1) Install basic local exchange service within 5 business days after receipt of an order from the customer unless the customer requests an installation date that is beyond 5 business days after placing the order for basic service and to inform the customer of its duty to install service within this timeframe. If installation of service is requested on or by a date more than 5 business days in the future, the telecommunications carrier shall install service by the date requested. A telecommunications carrier offering basic local exchange service utilizing the network or network elements of another carrier shall install new lines for basic local exchange service within 3 business days after provisioning of the line or lines by the carrier whose network or network elements are being utilized is complete. This subdivision (d)(1) does not apply to the migration of a customer between telecommunications carriers, so long as the customer maintains dial tone.
>
> 220 ILCS 5/13-712 (d)(1)

D. The Proposed Order Does Not Clearly Specify Which Provisioning Intervals Apply To The Network Elements.

The HEPO does not clearly specify the provisioning intervals of the network elements. The HEPO does not: (1) state the provisioning intervals for HFPL without conditioning; and (2) indicate, if the 3/7/10 day provisioning intervals is only for loops not requiring conditioning, what are the provisioning intervals for loops requiring conditioning. In order to avoid any confusion, the HEPO should clearly indicate the exact provisioning intervals for the various network elements.

Although the HEPO indicates that "the Commission agrees with Ameritech that we have previously recognized that the Turn Up Test must be performed prior to turning an HFPL loop over to a requesting carrier and that the test can not be performed in 24

hours", no precise provisioning interval is indicated for the HFPL loop where no conditioning is requested. Proposed Order at 165.

Furthermore, Staff maintains that the guiding language in Section 13-801(d)(5) establishes the provisioning interval for the HFPL.

> …and one business day for the provision of the high frequency portion of the loop (line-sharing) for at least 95% of the requests of each requesting telecommunications carrier for each month.
> 220 ILCS 5/13-801 (d)(5)

The language clearly states that the HFPL portion of the loop should be provisioned in 24 hours for at least 95% of the requests. Moreover, although the Proposed Order indicates that the Commission has recognized that that the Turn Up Test must be performed prior to turning an HFPL loop over to a requesting carrier, previous orders have indicated this process is not labor intensive and requires little time to perform it.

> The Commission concludes that, consistent with the decision in the Arbitrations, the CLECs' proposed provisioning intervals, *which reflect the fact that provisioning an xSDL [sic] loop is not a labor intensive endeavo*r, should be adopted.(*emphasis added)*
>
> Illinois Line Sharing, ICC Docket 00-0393, March 14, 2001 at 73. ("Line Sharing")

The Commission in the Line Sharing order (Docket 00-0393) relies upon previous conclusions from the COVAD/Rhythms Arbitration, ICC Docket Nos. 00-0312/0313(consolidated). Issue No. 5 of the Arbitration between Ameritech and COVAD/Rhythms also dealt with intervals of providing the HFPL portion of the loop. As a result, Staff recommends that the Proposed Order adopt a 24 provisioning interval for the HFPL or, at the very least, that the provisioning interval for the HFPL be established concretely in the Proposed Order.

Additionally, the HEPO is ambiguous regarding the provisioning intervals where conditioning is required. The HEPO concludes:

> Further, we have also recognized that lines requiring conditioning take longer to provision than lines that do not. Nothing in the newly enacted legislation suggests that this was in error and we conclude that the 10 day period for providing loops requiring conditioning should apply to both loops ordered by CLECs and loops provided with only HFPL.…To that end Ameritech is ordered to incorporate the same 3/7/10 day provisioning intervals as are contained in its Business Rules into its tariffs, to assure that all orders for loops *not requiring conditioning* will be filled in a maximum of 10 days, *(emphasis added)*
>
> Proposed Order at 165.

First, the Proposed Order appears to apply a 10 day conditioning period for loops even loops provided with only HFPL. The last sentence of the cited language creates some ambiguity as to this interval and it should be corrected. Assuming that 10 days is the loop conditioning interval ordered in the Proposed Order, Staff disputes the conclusion that a 10 day interval is required for conditioning the HFPL and maintains that Section 13-801(d)(5) does not provide a 10 day interval for conditioning of the HFPL. See Staff Reply Brief at 55-58. Furthermore, Staff's interpretation of 13-801(d)(5) is consistent with previous orders from this Commission. See Staff Br. at 77 footnote 30 and Sprint Br. at 5-6. On two previous occasions this Commission, after carefully analyzing the evidence pertaining to the provisioning of the HFPL, rejected Ameritech's proposal for a 10 day provisioning interval for HFPL requiring conditioning. Id. Furthermore, Staff maintains it is significant that the legislature incorporated a 95% threshold in Section 13-801(d)(5) for Ameritech to provision the HFPL within one business day. The 95% threshold in essence gives Ameritech a 5% grace with respect

to the provisioning of HFPL within one business day. The inclusion of a threshold indicates that the legislature did not expect the underlying carrier to provision all HFPL installations (only 95% of them) within one business day. Therefore, some contemplation of Ameritech's difficulty in provisioning HFPL was taken into consideration in the establishment of this 95% threshold for the provisioning of HFPL.

Nevertheless, if the Commission finds that additional time is needed for the provisioning of the HFPL requiring conditioning, consistent with previous Commission findings, a three day provisioning interval should be ordered. *See* Line Sharing at 70-71. Moreover, the Proposed Order should specify whether any loop conditioning interval runs concurrently with the loop provisioning interval. Additionally, if the Commission finds that loops requiring conditioning should have longer provisioning intervals, the exact intervals should be specified for each type of network element. The HEPO is imprecise on this point. Consequently, the confusion could create an anti-competitive environment for the carriers.

For all the reasons stated above, the Proposed Order errs by adopting Ameritech's provisioning intervals. Staff asks that Staff's provisions be adopted.

Exception No. 4: Proposed Replacement Provisions

Consistent with these arguments, the Staff recommends that the Proposed Order be amended as follows:

6. Commission Analysis and Conclusion

> The Commission has reviewed the evidence and arguments of the parties and concludes that Ameritech's proposed provisioning intervals are not acceptable. In terms of the proposals seeking the removal of the "tolling" effect of the Turn Up Test, the Commission agrees with Ameritech that we have previously recognized that the Turn Up Test must be performed prior to turning an HFPL loop over to a requesting carrier, however, ~~and~~ that ~~the~~ test can ~~not~~ be performed in 24 hours. Further, we have also recognized

that lines requiring conditioning take longer to provision than lines that do not. Nothing in the newly enacted legislation suggests that this was in error and we conclude that the ~~10~~ 3 day period for providing loops requiring conditioning should apply to ~~both~~ loops ~~ordered by CLECs and loops~~ provided with only HFPL. More troubling is Ameritech's limitation on provisioning intervals relating to the number of locations and loops ordered. While it may be true that Ameritech's business rules contemplate the 3/7/10 day provisioning intervals ~~approved in the merger order~~, Section 13-801(d)(5) specifies the maximum time intervals shall not exceed 5 business days for the provision of unbundled loops, both digital and analog, and 10 business days for the conditioning of unbundled loops. Ameritech's tariff's under consideration here speak only to the lack of any timeline for orders per end user location in excess of 20 loops. Such an open ended tariff term grants too much discretion to Ameritech. To that end Ameritech is ordered to incorporate the same 5 ~~3/7/10~~ day provisioning intervals as are contained in Section 13-801(d)(5)~~its Business Rules~~ into its tariffs, to assure that all orders for loops ~~not requiring conditioning~~ will be filled in a maximum of ~~10~~5 days, regardless of the number of end user locations and loops ordered.

Additionally, Ameritech's tariff should contain the following language from Section 13-801(d)(5) regarding a shorter provisioning interval:

The Commission may establish a maximum time period for a particular network element that is shorter than for a comparable retail telecommunications service offered by the incumbent local exchange carrier if a requesting telecommunications carrier establishes that it shall perform other functions or activities after receipt of the particular network element to provide telecommunications services to end users. The burden of proof for establishing a maximum time period for a particular network element that is shorter than for a comparable retail telecommunications service offered by the incumbent local exchange carrier shall be on the requesting telecommunications carrier;

Ameritech's tariff should also include the following exclusionary language:

In measuring the incumbent local carrier's actual performance, the Commission shall ensure that occurrences beyond the control of the incumbent local exchange carrier that adversely affect the incumbent local exchange carrier's performance are excluded when determining actual performance levels. Such occurrences shall be determined by the Commission, but at a minimum must include work stoppage or other labor actions and acts of war. Exclusions shall also be made for performance that is governed by agreements approved by the Commission and containing timeframes for the same or similar measures or for when a requesting telecommunications carrier requests a longer time interval.

Exception No. 5: HEPO Issue J (secured frame)

The Proposed Order rejects Staff's proposal to incorporate a secured frame room option in order for Ameritech to comply with its obligation to provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine those network elements to provide a telecommunications service. See Proposed Order, p. 113. The conclusion in the Proposed Order appears to be based on a finding that Section 13-801(d)(1)'s requirement to allow requesting carriers to combine network elements is not related in any way to a CLEC's right under Section 13-801(d)(4) to use "a network element platform consisting solely of combined network elements of the incumbent local exchange carrier." In Staff's opinion, such a conclusion is not supported by the statutory language. Nothing in Section 13-801(d)(4) indicates that it only apply where the ILEC is performing all necessary work. Accordingly, Staff proposes that its recommendations be adopted as explained more fully in its Initial Brief and Reply Brief.

Exception No. 5: Proposed Replacement Provisions

Staff proposes that the following changes be made to the language of the Proposed Order:

5. Commission analysis and conclusion

The Commission has reviewed the evidence and arguments of the parties and ~~declines to~~ adopts Staff's proposal. We agree with Staff ~~The reason Staff gives for its proposal is~~ that section 13-801(d)(4) (establishing the right of a carrier to request a network elements platform without the carrier's provision of any facilities or equipment) must be read in conjunction with ~~applies to~~ section 13-801(1) (requiring Ameritech to provide network elements in a way that allows the requesting carrier to combine them for itself). Under section 13-801(d)(4), CLECs cannot be required to use any of their own equipment in using the network elements platform. Section 13-801(d)(1) requires Ameritech to provide

unbundled network elements in a manner that allows a requesting CLEC to combine those network elements to provide a telecommunications service. When read together, Ameritech must allow a requesting carrier to combine network elements to provide a telecommunications service without using any of its own equipment. Collocation arrangements require a carrier to use its own equipment. Thus, in order to comply with the requirements of Section 13-801 Ameritech must offer some method other than collocation for CLECs to combine elements. Ameritech's proposed tariff does not comply with this requirement, and Staff's "secured frame option" proposal does. Thus, Staff's "secured frame option" proposal is hereby adopted to bring Ameritech's tariff into compliance with this requirement. ~~In our view there is no nexus between the two sections, which seem to be mutually exclusive. Section 13-801(1) contemplates a situation where some work will always be required of a requesting carrier. Section 13-801(d)(4) contemplates a situation where work will never be required of a requesting carrier. Any attempt to remove the work requirement from section 13-801(1) is wholly without the intent os that statute. The only question is whether Ameritech has provided a requesting carrier the opportunity to combine unbundled network elements for itself. Ameritech asserts that is has, either through collocation arrangements or interconnection agreements. If Staff's position is that these two are insufficient, that is not apparent from its arguments or evidence. In the event that is Staff's position, the Commission disagrees with Staff and agrees with Ameritech that its offering complies with the requirements of section 13-801(1) in that it has provided requesting carriers the opportunity to combine unbundled network elements.~~

Exception No. 6: The Proposed Order Should Address Staff Issue 15

The Proposed Order did not address the provisioning interval for carriers taking under the "network elements platform" pursuant to Subsection (d)(4) of Section 13-801. Staff addressed this issue at pages 84 and 85 of its Initial Brief. (Staff Initial Brief, pp. 84-85). For the reasons stated in its Initial Brief, Staff submits that its language should be adopted with certain changes reflected below to be consistent with statutory requirements and the other portions of the Proposed Order.

Exception No. 6: Proposed Replacement Provisions

Staff proposes that the following double underlined language be inserted in the Proposed Order:

Provisioning interval for the Network Element Platform referred to in Section 13-801(d)(4).

Section 13-801(d)(6) of the PUA provides as follows:

> When a telecommunications carrier requests a network elements platform referred to in subdivision (d)(4) [see Issue XI] of this Section, without the need for field work outside of the central office, for an end user that has existing local exchange telecommunications service provided by an incumbent local exchange carrier, or by another telecommunications carrier through the incumbent local exchange carrier's network elements platform, unless otherwise agreed by the telecommunications carriers, the incumbent local exchange carrier shall provide the requesting telecommunications carrier with the requested network elements platform within 3 business days for at least 95% of the requests for each requesting telecommunications carrier for each month.

220 ILCS 5/13-801(d)(6).

Ameritech

The Company indicates that it has included the following language in its tariff in order to comply with the first sentence of Section 13-801(d)(6):

> When a telecommunications carrier places an order for a Pre-Existing UNE-P that does not require field work outside of the central office, for an end user that has existing local exchange telecommunications service provided by the Company, unless otherwise agreed by the Company and the requesting telecommunications carrier, the Company shall provide the requesting telecommunications carrier with the ordered Pre-Existing UNE-P within 3 business days for at least 95% of the orders for each requesting telecommunications carrier for each month.

Ameritech Initial Brief, p. 36.; Am. Ill. Ex. 1.0, Attach. 1.2, p. 29; Am. Ill. Ex. 2.0, p. 25.

Staff

In connection with this requirement, Staff proposed that the following language be inserted in Ill. C. C. No 20, Part 19, Section 15, Sheet 4:

> When a telecommunications carrier requests a network elements platform referred to in this Section, without the need for field work outside of the central office, for an end user that has existing local

> exchange telecommunications service provided by an incumbent local exchange carrier, or by another telecommunications carrier through the incumbent local exchange carrier's network elements platform, unless otherwise agreed by the telecommunications carriers, the incumbent local exchange carrier shall provide the requesting telecommunications carrier with the requested network elements platform within 3 business days for at least 95% of the requests for each requesting telecommunications carrier for each month.

Staff Initial Brief, pp. 84-85; ICC Staff Ex. 1.0 (Graves), pp. 23-24. This language parallels the language of the PUA and is similar to the language in Ameritech's proposed tariff at Ill. C. C. No. 20, Part 19, Section 15, Sheet 7.

Joint CLEC IB at p. 11.

The Joint CLECs propose the following language in Attachment 1 to their Initial Brief (CLEC Proposed tariff) at Ill. C. C. No. 20, Part 19, Section 15, Sheet 7):

> When a telecommunications carrier places an order for a UNE-P that does not require field work outside of the central office, for an end user that has existing local exchange telecommunications service provided by the Company, unless otherwise agreed by the Company and the requesting telecommunications carrier, the Company shall provide the requesting telecommunications carrier with the ordered UNE-P within 3 business days for at least 95% of the orders for each requesting telecommunications carrier for each month. Unless otherwise agreed by the Company and the requesting telecommunications carrier, the Company shall provide the ordered UNE-P without any disruption to the end user's services.

Commission Conclusions

As the Commission found with respect to issues B and C above, the legislature's definition of network element platform encompass all combinations of network elements including UNE-P, EELs, Point to Point Circuits, and UNE-P with line splitting. We find Staff's proposed tariff language on this issue to be the only language consistent with the full intent of the legislature by incorporating the legislature's term "network element platform". However, Staff's proposal needs to be modified because Staff's language only appears in the UNE-P section of Ameritech's tariff, and could be construed to only apply to UNE-P. Such a construction would be improper because the statutory provisioning interval also applies to as is conversions of EELs, point to point circuits, and UNE-P with line splitting. Thus, Staff's proposed language should also be included in the EELs

section of the tariff. We also note that the final line of the first paragraph of Section 13-801(d)(6) provides that "[t]he incumbent local exchange carrier shall provide the requested network element platform without any disruption to the end user's services." We have already discussed the necessity of provisioning the network elements platform without any disruption to the end user in connection with our discussion of line splitting, and do not repeat that discussion here. However, this requirement should be reflected in the tariff language for the UNE-P and EELs sections of Ameritech's tariff.

Exception No. 7: Issue 4 -- Interconnection Must be at Least Equal in Quality and Functionality to the Service Ameritech Provides to Itself or its Affiliates

The Proposed Order did not address the "equal in quality and functionality" requirements contained in Section 13-801. Staff addressed this issue at pages 23 through 27 of its Initial Brief. (Staff Initial Brief, pp. 23-27). For the reasons stated in its Initial Brief, Staff submits that its proposals should be adopted.

Exception No. 7: Proposed Replacement Provisions

Staff proposes that the following double underlined language be inserted in the Proposed Order:

General Provisioning Standards for Interconnection and Network Elements

Staff

Interconnection

Section 13-801(b)(1)(C) of the PUA requires an incumbent LEC to provide interconnection:

> that is at least equal in quality and functionality to that provided by the incumbent local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the incumbent local exchange carrier provides interconnection.

220 ILCS 5/13-801(b)(1)(C). Section 251(c)(2)(C) of the Telecommunications Act of 1996 contains a similar requirement as follows:

> (2) INTERCONNECTION.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange network-- …
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.

47 U.S.C. §251(c)(2)(C).

Staff notes that the Federal Communications Commission interpreted this language in their First Report and Order, *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act*, FCC 96-325, para. 224 (Rel. August 8, 1996) ("Local Competition Order") as follows:

> 224. We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party. We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks. Contrary to the view of some commenters, we further conclude that the equal in quality obligation imposed by section 251(c)(2) is not limited to the quality perceived by end users. The statutory language contains no such limitation, and creating such a limitation may allow incumbent LECs to discriminate against competitors in a manner imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace (e.g., the imposition of disparate conditions between carriers on the pricing and ordering of services).

Staff proposes that the following language be inserted in the "Responsibilities of the Company" section of the interconnection tariff at Ill. C. C. No. 20, Part 23, Section 2, Sheet No. 4:

> Interconnection will be at least equal in quality and functionality to that provided by the Company to itself or to any subsidiary, affiliate, or any other party to which the Company provides interconnection.

See ICC Staff Ex. 1.0, pp. 10-11, lines 221-234; ICC Staff Ex. 1.1, p. 6, lines 121-142. This language tracks the language of the PUA except that "the incumbent local exchange carrier" has been replaced with "the Company" to avoid confusion. ICC Staff Ex. 1.0, pp. 10-11, lines 221-234.

Network Elements

With respect to network elements, Section 13-801(d) of the PUA provides, in relevant part, as follows:

> (d) Network Elements. The incumbent local exchange carrier **shall provide** to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, **nondiscriminatory access to network elements** on any unbundled or bundled basis, as requested, at any technically feasible point **on just, reasonable, and nondiscriminatory rates, terms, and conditions**.

220 ILCS 5/13-801(d) (emphasis added). The "nondiscriminatory rates, terms, and conditions" language from Section 13-801(d) of the PUA is identical to the language found in Section 251(c)(3) of the Telecommunications Act of 1996.

In the *Local Competition Order* the FCC found that the "nondiscriminatory access" requirement of Section 251(c)(3) should be interpreted to require access that is "equal-in-quality" with an exception only where such requirement is technically infeasible to meet:

> 313. We believe that Congress set forth a "nondiscriminatory access" requirement in section 251(c)(3), rather then an absolute equal-in-quality requirement, such as that set forth in section 251(c)(2)(C), because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such elements, that are equal-in-quality to what the incumbent LECs provide themselves. According to some commenters, this problem arises in connection with one variant of one of the unbundled network elements we identify in this order. These commenters argue that a carrier purchasing access to a 1AESS local switch may not be able to receive, for example, the full measure of customized routing features that such a switch may afford the incumbent. In the rare circumstances where it is technically infeasible for an incumbent LEC to provision access or elements that are equal-in-quality, we believe disparate access would not be inconsistent with the nondiscrimination requirement. **Accordingly, we require incumbent LECs to provide access and unbundled elements that are at least equal-in-quality to what the incumbent LECs provide themselves, and allow for an exception to this requirement only where it is technically infeasible to meet.** We expect incumbent LECs to fulfill this requirement in nearly all instances where they provision unbundled elements because we believe the technical infeasibility problem will arise rarely. We further conclude, however, that the incumbent LEC must prove to a state commission that it is technically infeasible to

> provide access to unbundled elements, or the unbundled elements themselves, at the same level of quality that the incumbent LEC provides to itself.

Local Competition Order, para. 313 (emphasis added).

Staff submits that the FCC's treatment of the "nondiscriminatory access" and "equal in quality" standards be followed in application of Section 13-801 of the PUA.. As explained by Staff witness Graves:

> the potential that it will be "technically infeasible" to meet an equal in quality standard for certain network elements continues to exist. Although "non-discriminatory" should generally be interpreted to mean "equal in quality", it is reasonable and rational to follow the FCC's decision to allow for an exception to the equal in quality requirement only where it is technically infeasible to meet the equal in quality standard.

ICC Staff Ex. 1.1, p. 5, lines 115-120.

Ameritech's Tariff No. 20, Part 19, Section 1, discusses the general terms of Ameritech's proposed revised UNE offerings (Tariff No. 20, Part 19, Sections 1 - 22). The "General" section of the tariff addresses service quality. Regarding service quality Ameritech's current proposed tariff states:

> Quality of Unbundled Network Elements
>
> To the extent applicable, unbundled network elements are pre-ordered, ordered, provisioned, provided, maintained and billed through the same standard facilities, interfaces, systems, specifications, procedures and practices that Company uses to provide comparable switching services to other carriers and customers, on either a bundled or unbundled basis, with the objective of providing switching that is equal in quality to all users. Quality is measured through the objective performance characteristics of each unbundled network element, such as peak hours capacity, transmission standards, interface specifications, protocols, procedures, practices, service and repair intervals, etc.

This language discusses providing UNEs through the "same" systems, providing "comparable" switching services, and the "objective of providing switching that is equal in quality". This language falls short of the equality required by the language of the PUA and TA96 cited above. First, equality only appears to be an "objective" under Ameritech's tariff language, not a requirement. Second, "equality" only appears to be an objective for "switching".

Staff proposes that the following language be added to Ill. C. C. No. 20, Part 19, Section 1, Sheet No. 4:

> Unbundled Network Elements (UNEs) and Access to UNEs will be at least equal in quality and functionality, where technically feasible, to that provided by the Company to itself or to any subsidiary, affiliate, or any other party to which the Company provides access to network elements. In those instances were provisioning intervals are specifically addressed by Section 13-801(d)(5) of the Illinois Public Utilities Act the Company will provide UNEs consistent with the PUA and existing Commission orders.

ICC Staff Ex. 1.1, p. 7, lines 143-162. Staff's states that its proposed language applies the "nondiscriminatory access" requirement of Section 13-801(d) in a manner consistent with the FCC's interpretation of identical language in Section 251(c)(3) of the Telecommunications Act of 1996. Staff's notes that its proposal also adds language to take into account that Section 13-801(d)(5) provides further guidance on the quality of provisioning some specific UNEs. Id.

Ameritech

Ameritech, in its Reply Brief at page 73, appears to support Staff's position that interconnection be at least equal in quality to that provided to itself or is affiliate:

> [The PUA] explicitly imposed obligations relating to the affiliate only in three limited circumstances: . . . 2) Section 13-801(b)(1)(C), which requires the ILEC to provide interconnection that is at least equal in quality and functionality to that provided to itself or its affiliates. . .

Ameritech did not respond to Staff's proposed language in its Initial Brief, but instead responded to older language that Staff did not update in its proposed tariff attached to Staff's Initial Brief. The proposed language that Ameritech responded to read:

> Interconnection will be at least equal in quality and functionality to that provided by the Company to itself or to any subsidiary, affiliate, or any other party to which the Company provides interconnection. See Part 2, Section 10 of this tariff for the objective performance characteristics, how they are measured, and remedies for inferior service.

In Ameritech's Initial Brief at footnote 49, Ameritech responded to the above service quality language proposal stating:

> Mr. Silver testified that the following language proposed by Staff for Tariff 20, Part 19, Section 1, Sheet 4 appeared to be acceptable. (Am. Ill. Ex. 3.1, p. 40). "See Part 2, Section 10 of the their tariff for the objective performance characteristics, how they are measured, and remedies for inferior service." On closer review, the term "remedies for inferior service" is incorrect because

it implies that performance has been less than that provided to others, when in fact remedies are available when Ameritech Illinois fails to meet particular benchmark standards. For this reason, it would be more accurate to say "See Part 2, Section 10 of this tariff for the objective performance characteristics, how they are measured, and available remedies."

CLECs

No CLEC interveners commented on this issue.

Commission Conclusion

It is unfortunate that Staff and Ameritech appear to be talking past each other on this issue. Both parties appear to agree on Ameritech's service quality obligation, but Staff and Ameritech address different language versions. The Commission requires Ameritech to implement the following language in Tariff 20, Part 23, Section 2, Sheet 4:

> Interconnection will be at least equal in quality and functionality to that provided by the Company to itself or to any subsidiary, affiliate, or any other party to which the Company provides interconnection. See Part 2, Section 10 of this tariff for the objective performance characteristics, how they are measured, and available remedies.

This language is consistent with the Act and appears to accomplish the goals of both Ameritech and Staff regarding this issue.

Similarly, the Commission requires Ameritech to add the following language to Ill. C. C. No. 20, Part 19, Section 1, Sheet No. 4:

> Unbundled Network Elements (UNEs) and Access to UNEs will be at least equal in quality and functionality, where technically feasible, to that provided by the Company to itself or to any subsidiary, affiliate, or any other party to which the Company provides access to network elements. In those instances were provisioning intervals are specifically addressed by Section 13-801(d)(5) of the Illinois Public Utilities Act the Company will provide UNEs consistent with the PUA and existing Commission orders.

Exception No. 8: The Proposed Order Should Incorporate Tariff Language

As noted in the Proposed Order "proposed tariffs, in their entirety, were proffered by Ameritech and Staff, as well as by: AT&T, WorldCom, IPTA, and PACE (attached to

jointly sponsored direct testimony)". Proposed Order, p. 2. Notwithstanding this effort by Staff and the Parties, the Proposed Order neither incorporates nor attaches tariff language consistent with the Proposed Order's findings and conclusions. Given the complexity of the issues involved in this docket and the likelihood of debate at to the correct interpretation of the findings and conclusions into specific tariff language, Staff recommends that the final order in this proceeding incorporate or attach compliant tariff language. In this regard, Staff has attached hereto as Attachment A tariff language that Staff believes is consistent with the findings and conclusions contained in the Proposed Order as currently formulated. Staff recommends that such tariff language be specifically incorporated into the ordering provisions of the Proposed Order, with such revisions as are necessary to reflect any exceptions and changes ultimately adopted by the Commission.

Exception No. 8: Proposed Replacement Provisions

Staff proposes that the following changes be made to the language of the Proposed Order:

> IT IS FURTHER ORDERED that Ameritech Illinois shall file revised tariffs in accordance with the Commissions findings of fact~~,~~ and conclusions of law ~~and as directed in the prefatory portion of this order~~ within thirty days of ~~its~~ service of this order, and such revised tariffs shall be fully and completely consistent with the language included in the tariffs attached to this order as Attachment A.

CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that the Administrative Law Judge's Proposed Order be modified in the manner stated above.

Respectfully submitted,

_____

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